

**PENN ENVIRONMENTAL
CONTROL, INC.****CONTRACT NO. V513C 220****VABCA -3726****VA MEDICAL CENTER
BATAVIA, NY**

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OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

Penn Environmental Control, Inc. ("PEC" or "Appellant"), has timely appealed from a Department of Veterans Affairs ("VA" or "Government") Contracting Officer's ("CO") deemed denial of PEC's claim for an equitable adjustment arising from allegedly differing site conditions encountered by PEC during the performance of the asbestos abatement contract from which this appeal arises. PEC alleges that it encountered unexpected conditions in performing the contract which increased its costs of performance. The bulk of PEC's claim involves the alleged increased costs resulting from the type of wall construction encountered. With the exception of a concrete ceiling encountered in one area, a brick wall in another, and acoustical tile attached to ceilings in other areas, the VA maintains that no differing site conditions existed and that PEC would have been aware of the types of wall construction it encountered had it inspected the site prior to submitting its bid.

The record in this appeal consists of the Pleadings; the Appeal File, consisting of 122 tabbed exhibits (cited as "R4, tab _____"); 12 exhibits introduced at the hearing (cited as "Exh. A- ____"); 45 paragraphs of the parties' Fact Stipulations (Exh. J1, ¶¶ 1 through 45); and a transcript of the two day hearing conducted in Batavia, New York (cited as "Tr. ____"). The parties' *seriatim* briefs (cited as "App Br. at _____," "Rply Br. at _____," and "App Rebut. Br. at ____") are also part of the record. Both entitlement and quantum are at issue.

FINDINGS OF FACT**GENERAL**

Contract No. V513C220 ("Contract"), for the abatement of asbestos in Wards B and D at the Department of Veterans Affairs Medical Center in Batavia, New York ("VAMC Batavia") was awarded to Penn Environmental Control on January 29, 1991. The fixed-price construction Contract had an initial price of \$191,638. (R4, tab 3), and a completion date of not later than 150 days after issuance of the Government's Notice to Proceed ("NIP"), which was issued on June 13, 1991. Accordingly, the initial Contract completion date was November 10, 1991. Several modifications of the Contract extended the

Contract completion date to January 13, 1992; PEC completed the Contract work on January 21, 1992. (R4, tabs 3, 4, 15, 23, 32; Exh. J1, 1T ¶¶ 3, 4, 18)

The Contract includes the standard Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, and Department of Veterans Affairs Acquisition Regulation ("VAAR"), 48 C.F.R. Chapter 8, clauses usually found in VA construction contracts, including the following clauses relevant to this appeal:

DISPUTES, FAR 52.2331 (APR 1984)
DIFFERING SITE CONDITIONS, FAR 52.2362 (APR 1984)
SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK,
FAR 52.2363 (APR 1984)
CHANGES, FAR 52.2434 (AUG 1987)
CHANGES SUPPLEMENT (FOR CHANGES COSTING \$500,000 OR
LESS), VAAR § 852.23688 dune 1987)

The Contract required PEC to remove and dispose of asbestos pipe wrapping in various locations at VAMC Batavia. To accomplish these removals, PEC was required to make wall and ceiling openings to provide access to the piping. The wall and ceiling openings and wrapping removals were to be performed under full asbestos containment conditions, which involved completely sealing off the work area in an enclosure under negative air pressure. The debris from the wall and ceiling demolition, together with the asbestos pipe wrappings, were defined in the Contract as representing asbestos contaminated material ("ACM") or asbestos contaminated elements ("ACE") for which elaborate bagging and disposal procedures were specified. For removal areas into which patients would subsequently be relocated, an additional procedure, lock back encapsulation, was also required. (Tr. 4041, 4344, 15557)

PEC neither attended the pre-bid conference and site visit scheduled in the Invitation for Bids nor did it otherwise inspect the site prior to submitting its bid. (Exh. J-1, ¶ 2)

BRICK WALLS, CEILINGS, AND ACOUSTICAL TILE

PEC encountered brick walls in two rooms during the course of its work. Contract Drawing AR-2, 2nd Floor Asbestos Removal Plan, depicts Rooms B-263 and B-275 by plan view. Room B-263 is on the west exterior of VAMC Batavia while Room B-275 is an interior room. The Government concedes that the brick wall encountered in Room B-275 was a differing site condition. During a site visit conducted by the Board in the course of the hearing, painted over exterior windows were observed in the interior walls of Room B-263 and the solid, brick nature of the walls was obvious by visual observation. (R4, tab 122; Tr. 100, 182; Rply Br. at 7)

Nothing in Drawing AR-2, Drawing AR-5's summary of asbestos contaminated materials, or the Contract specifications indicate that a brick wall would be encountered in Room 263. (R4, tabs 121, 122)

PEC also alleges that it encountered concrete ceilings in Rooms B-269 and B-273; Contract Drawing AR-2 indicated plaster ceilings in these areas. The Government acknowledges that the concrete ceiling in Room B-269 constituted a differing site

condition; however, the VA questions whether the ceiling in Room B-273 was concrete. In un rebutted testimony, Mr. Hastee, the VA's COTR, concluded that the ceiling in Room B-273 was not concrete, a conclusion he based on viewing the type of ceiling framing material. The framing material in Room B-273 was standard metal channel and lath, not the half-inch reinforcing bar present in Room B-269, where Mr. Hastee acknowledged a concrete ceiling was encountered. The Board viewed the disputed ceilings during its site visit; however, no conclusion with regard to ceiling material could be reached on simple visual examination. On this record we find that only the ceiling in Room B-269 was concrete. (R4, tabs 121, 122; Tr. pp. 99100, 123, 18081; Rply Br. at 7)

The Government also concedes that PEC encountered unexpected acoustical tile directly attached to the plaster ceiling on the 2nd Floor of VAMC Batavia as asserted by PEC. (Rply Br. at 7)

PEC included its additional costs for the brick walls, concrete ceilings and acoustical tile in its total 2nd Floor claim of \$41,250.51. PEC claims 112 additional hours of labor effort related to work on 56 square feet (SF) of concrete ceiling; 36.6 hours for the 146 SF of acoustical ceiling tiles; and, 30 hours of additional labor for work on 12 SF of brick wall. Based on the conclusion that only 20 SF of concrete ceiling was removed in room B-269, the VA estimated, based on Mr. Hastee's direct prior experience in penetrating concrete ceilings, that 4 hours of labor were required. The VA contends that no additional labor was required to cut through the acoustical tile attached to the plaster ceiling; therefore, the VA would not recognize any additional labor effort for acoustical tile. For removal of the 12 SF of brick wall, the VA estimated, again grounded in Mr. Hastee's experience at VAMC Batavia, that 8 labor hours were required. (R4, tabs 29, 119; Tr. 18993)

Based on the record, particularly the un rebutted testimony of Mr. Hastee regarding these areas, we find that PEC encountered the brick walls in rooms B-263 and B-275, and that it encountered a concrete ceiling in Room B-269. We also find the square footage of these materials to be the amount estimated by the VA.

The per SF labor rates for this work claimed by PEC are substantially higher than the estimates made by the VA. The record is sparse as to the reason for this difference. However, the PEC rates were developed on the basis of records kept by PEC's project supervisor and these removals were performed under the exigency of full asbestos containment procedures. It is not clear from the record whether Mr. Hastee considered the effect of asbestos containment requirements in his estimates; thus, we accept the per SF rates used by PEC. Regarding PEC's acoustical tile claim, we find that acoustical tile was not removed independent of the ceiling removal; consequently, no additional labor hours were required to remove the acoustical tile. (R4, tabs 29, 58A, 58B; Tr. 10411, 191)

INTERIOR WALLS

To clarify our consideration of the aspects of this appeal relating to work on interior walls, some definition and explanation of the type of interior wall construction relevant to this matter is necessary. As will be shown, the record establishes several different types of interior plaster wall construction. Of relevance to our consideration here are two

particular types of interior plaster walls. The first type is what we will denote as "hollow wall" construction. This type of wall is constructed of vertical metal studs, to which a metal mesh or "lath" is attached; the plaster, in various coats, is applied to the lath. The second type of construction we will denominate "speed tile." A speed tile plaster wall, for our purposes, consists of a wall of hollow masonry blocks to which various coats of plaster are directly applied. (Tr. 16771)

Contract Drawing AR-5, entitled TABLES, NOTES & DETAILS, is relevant to our consideration. The drawing contains a detailed Summary of Work, describing in detail the types and quantities of ACM or ACE to be encountered in each Contract work area. The relevant portions of this summary follow:

SUMMARY OF WORK

CONTAMINATED MATERIAL TO BE REMOVED AND DISPOSED OF AS ACM.

Abatement Area	Room No. / or Location	Square Feet of Plaster Wall **
1	D378	35
1	D377 & D377A	195
1	D376	40
1	D375 & D375A	20
1	D374	210
1	EXIT	Radiator-20
1	D373	20
1	D372	75
1	D369	Radiator-20
1	D370	15 / Radiator-20
1	D363	295 / Radiator-20
1	D361	75
1	D359	70
1	D358	Radiator-20
1	D357	20
1	D352	20
1	D347	69
1	D346	39
1	D345	52
1	D344	91
5	B283	18
5	B282 & B282A	48
5	B279	Radiator-20 / 40
5	B278	60
5	B277	20
5	B275 & B275A	52
5	B274	4
5	B268	212
5	B266	8
5	B260	40
5	B256	8
5	B253	4

5	B252	4
5	B251	4
5	B250	26
5	B249	24

**SUMMARY OF WORK
CONTAMINATED MATERIAL TO BE REMOVED AND DISPOSED OF AS
ACM.**

Abatement Area	Room No. / or Location	Square Feet of Plaster Wall **
5	B263	4
5	B272	4
5	B273	4

** May include other finishes overlaying plaster

(R4, tab 122)

In addition, Contract Drawing AR-5 contains a detail entitled "Wall Enclosures" which depicts by "plan" or overhead view of a wall section. The detail consists of a thin rectangle with no scale indicated for width. Inside the rectangle is a shaded rectangle identified as a "Wall Enclosure." This detail also contains a note stating: "EXIST. WALL WIDTHS VARY PER EXIST. WALL CONDITIONS. "

(R4, TAB 122)

Finally, General Note 1, also contained on Contract Drawing AR-5, states as follows:
GENERAL NOTES

1. CONTRACTOR SHALL VERIFY ALL EXISTING CONDITIONS
AND DIMENSIONS.

(R4, tab 122)

Contract Specification Section 01569, ASBESTOS ABATEMENT, in Subsection 1.1.2, EXTENT OF WORK, sets forth, in pertinent part, the following terms:

1.1.2 EXTENT OF WORK: A brief summary of the work
and non binding to the contract documents is as follows:

A. Removal and disposal of asbestos
contaminated materials (ACM) and
asbestos contaminated elements (ACE)
with full containment in the following
approximate quantities:

Abatement Area 1:

* * * *

1511 Square Feet of Plaster Wall

*	*	*	*
<i>Abatement Area 5:</i>			
*	*	*	*
604 Square Feet of Plaster Wall			
*	*	*	*

(R4, tab 121)(emphasis added)

Specification Section 01569 also states, in pertinent part:

1.2 DIFFERING SITE CONDITIONS: The quantities and location of ACM and ACE indicated on the drawings and the extent of work included in this section *are only best estimates which are limited by the physical constraints imposed by occupancy of the buildings.* Accordingly, minor variations (+10%) in quantities of ACM and ACE within the limits of containment for each abatement stage are considered as having no impact on contract price and time of this contract. Locations of ACM and ACE different than indicated on drawings but within the limits of containment are considered as having no impact on contract price and time of this contract. Where additional asbestos abatement work is required beyond the above variations, the contract price and time will be adjusted under provisions of [that] clause entitled "Differing Site Conditions" (FAR 52.2362) of Section 01001, General Conditions.

(R4, tab 121)(emphasis added)

The Contract drawings and specifications were prepared by the VA's Architect-Engineer, Joseph Lu Engineering ("Lu" or "A/E"). Lu prepared the Contract drawings and specifications based on visual surveys during site visits, information from VAMC Batavia employees, and "as-built" drawings of the facilities. Under its contract with the VA, Lu did not undertake a detailed architectural or engineering survey, nor did it sample, or make penetrations of, interior walls in Contract work areas. (Tr. 6383)

Christine Davey, Lu's project manager, and the person principally responsible for the preparation of the Contract plans and specifications, had no personal knowledge of the type of wall construction at the VAMC Batavia other than that the walls had an outer layer of plaster. However, during at least one site visit, Ms. Davey visited certain attic areas from which vantage point speed tile walls were visible within the 2nd floor area. Notwithstanding this site visit, however, and although Davey knew that some form of substrata behind the plaster coat was necessary to support the walls, the Contract drawings and specifications simply identified the walls as "plaster walls." (Tr. 8081, 201)

Andrew J. Hastee, the Contracting Officer's Technical Representative ("COTR") on the Contract, was responsible for reviewing the Contract plans and specifications during their preparation by Lu. Hastee described the scope of his responsibilities in this regard as being to "look at the blueprints and say, yes, that's right, and if there was something I saw that I thought was not right, I would just give them my recommendation." At the time of the hearing, Mr. Hastee had been employed at the VAMC Batavia for 23 years.

As a former electrician at VAMC Batavia, Mr. Hastee had frequently cut into the facility's walls, and, by his own testimony, was fully aware of the various types of wall construction to be found in the hospital facility. In Hastee's estimation, approximately 60% of the walls at VAMC Batavia were constructed of speed tile. During the course of Lu's preparation of the Contract plans and specifications and several "design review" meetings involving Lu and VAMC Batavia personnel, neither Mr. Hastee nor any other knowledgeable VA employee in attendance ever informed Lu that the majority of walls in the Contract work area consisted of plaster on speed tile construction. (Tr. 16771, 204-205)

In mid-August 1991, PEC encountered speed tile while making openings in the 2nd floor walls. Shortly after this discovery, PEC orally informed the COTR that speed tile walls had been encountered